IN THE

Supreme Court of the United States

October Term 1977

No. 77-546

MILTON SILVERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 11, 1977

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The petitioner, Milton Silverman, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 31, 1977, in this proceeding.

Opinions Below

The opinion of the Court of Appeals, reprinted in the Appendix hereto, is reported at 556 F.2d 655. The two opinions of the District Court for the Southern District of New York, dated May 15, and July 16, 1976, also reprinted in the Appendix hereto, were not officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 31, 1977. A timely petition for rehearing and hearing *en banc* was denied on July 14, 1977. A motion for recon-

sideration of the petition for rehearing, based on germane documents subsequently released by respondent (annexed hereto and discussed hereinafter) was denied on August 30, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether, in a proceeding under 28 U.S.C. Section 2255, respondent may withhold documents in its possession showing knowing prosecutorial use of perjured testimony at the original trial?

2. Whether a petition brought under 28 U.S.C. Section 2255 should be granted, or at least a hearing held, where the petition, detailed supporting affidavits, and other documents, show the original trial was tainted by knowing prosecutorial use of perjury and suppression of exculpatory evidence and respondent does not traverse that showing?

3. Whether, in a 28 U.S.C. Section 2255 proceeding, the District Court may use documents submitted *in camera* by respondent under "a bond of confidentiality" in denying the petition without revealing those documents to the petitioner or holding a hearing?

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

28 U.S.C. Sec. 2255:

> ". . . . Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. . . ."

Statement of the Case

Petitioner, Milton Silverman, instituted a proceeding under 28 U.S.C. Section 2255 to vacate his conviction under indictment 68 Cr. 762(SDNY) on eight counts charging him with violations of 18 U.S.C. Section 664, 29 U.S.C. Sections 439(b) and (c) and Section 501(c). (5,6),* alleging, *inter alia*, the embezzlement of funds of Local 810, International Brotherhood of Teamsters, of which he was then president, in the form of loans and Christmas gratuities, and the falsification of union forms and records to conceal the embezzlement (5,6). After his conviction was affirmed,** petitioner served his sentence of eight months, paid his $8,000 fine, but continued to be prohibited from employment by a union or union welfare or pension plan—his life-long occupation, suffered obloquy in the community (6) and burned with the sense of an injustice done him.

Of particular pertinence to the present proceeding is the conviction under count 18 which charged him with falsification (alteration) of the Local 810 Executive Board minutes, amounting, on the basis of the proof at the trial,

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* References in the form, e.g. "(5,6)" are to the joint appendix on appeal. The issues raised in the present proceeding were not previously available to petitioner on the direct appeal from his conviction 430 F.2d 106 (2d Cir. 1970), cert. den. 402 U.S. 953, reh. den. 403 U.S. 924 (1971) or on his appeal from denial of a new trial, 469 F.2d 1404 (2d Cir. 1972), cert. den. 411 U.S. 982 (1973), (6,24).

** See previous footnote.

to changing the December, 1965, minutes to reflect authorization of a loan and reimbursement of Christmas gratuities to him (8). That charge and the conviction thereon is directly related to all the charges on which petitioner was convicted as a result of count 18's allegation of a general falsification of union records (despite the singular instance in the proof) and the trial court's instruction to the jury that the evidence concerning the falsification of union records should be considered in connection with all the evidence in the case (i.e., evidence of consciousness of guilt) (8).

The perjured testimony knowingly used by the prosecution under count 18 was that of the final witness in the case, Jacob Friedland, who testified for the prosecution on rebuttal. During the investigation of Local 810 which led to petitioner's indictment, the Local was served with a subpoena duces tecum to produce its records before a grand jury in the Southern District of New York (7-8). Friedland, an attorney, was retained by Local 810 to examine those records (Ibid.) and after doing so, prepared a confidential report which stated that the December, 1965, Executive Board minutes did not reflect authorization of payments to Silverman of a loan and reimbursement of Christmas gratuities, which were in fact made (42). However, the Executive Board minutes as produced before the grand jury and the trial jury did reflect authorization of these payments to petitioner (9). See 430 F.2d at 121. Friedland, who resisted testifying at the trial on the attorney-client privilege, which was overruled, and the privilege against self-incrimination, finally testified under a grant of immunity as the final witness at the trial, on the prosecution's rebuttal case. (8, 11-13). He testified that he had no recollection of the original state of the December, 1965, Executive Board minutes nor of any change in them, that he

had "no recollection of the minute books or how they were written", but only by comparing his confidential report with the minutes in the form they were as trial exhibits could he say that there appeared to have been a change to authorize the loan and reimbursement payments to Silverman (8-9; 556 F.2d at 657).

What the prosecutor did not disclose at the trial or thereafter was that he had secured authorization from the Department of Justice for the grant of immunity to Friedland based on his memorandum of March 11, 1969, in which he stated that the crime from which Mr. Friedland was to be immunized was "obstruction of justice on the part of Mr. Friedland in the tampering with the books in question." (See Appendix, *infra*). Petitioner had learned of the existence of this memorandum, but not of its contents or purport through an application under the Freedom of Information Act (5 U.S.C. Sections 552 *et seq*) before the petition was filed but his application for production of the memorandum was denied by the Department of Justice as was expedition of the appeal from that denial (110-11, 135). This memorandum was also sought by motion (18), by subpoena (138A), all of which respondent ignored and the District Court declined to grant or enforce (132, 151-3, 157-8). In fact the memorandum was not produced for petitioner until *after* the petition for rehearing was denied in the Court of Appeals, whereupon petitioner moved to reopen the petition for reargument—and the appeal—(See Appendix, *infra*) on the grounds that the withholding of that memorandum was a further denial of due process to petitioner and a fraud upon the Court of Appeals. (Ibid.) The motion was denied without opinion. (Ibid.)

Two witnesses who could have given the lie to Friedland's testimony were suppressed by the prosecutor's repeated subpoenaing of them before grand juries and

other inquisitorial bodies, threatening them with prosecution, offering them immunity and then withholding it (28, 46). As a result it was not until shortly before the petition was filed that petitioner learned that these witnesses Sophie Oschak, Recording Secretary of the Executive Board, and Max G. Sanchez, Vice-President of Local 810 (25, 44) had themselves actually participated in the change of the Executive Board minutes at the direction of Friedland (26-7, 44-6). As a result of the suppression of these witnesses, petitioner did not learn until about the same time of a third witness, Herman Brickman, who was crucial inasmuch as his representation for independence and integrity as an impartial arbitrator and his lack of association with either Silverman or the union would have insulated him from the attack on his credibility that the prosecutor made on union-oriented witnesses, was also present at the change of the minutes and explained the wholly innocent manner in which the minutes were changed.* (48-50). The affidavits of these three witnesses were annexed to the petition and were in no way contravened by respondent.

The assistant United States attorney who prosecuted petitioner did submit an affidavit "in opposition" to the petition, the only opposing 'factual' showing (90-2). That

* Friedland inquired of Oschak and Sanchez if the Executive Board had in fact authorized the loan and gratuity reimbursement to petitioner. When they informed him it had, he directed the minutes be changed to reflect that fact. Friedland, the attorney retained by Local 810, told Oschak and Sanchez that changing the minutes in the manner he directed was legal, proper and necessary to reflect the action actually taken by the Executive Board (27, 45). Brickman also informed them that such a change was perfectly proper and was of a type often made since union people making minutes were rarely parliamentarians (49). All these witnesses agree that Silverman was not informed of this (27, 47, 49-50). Doubtless Friedland, when himself threatened by the prosecutor with criminal action, became fearful and agreed to testify in the manner he did.

affidavit in no way traversed the sworn statements of Oschak, Sanchez and Brickman but merely states that the assistant did not know what Friedland would say before he testified (91), but as the affidavit also admits that Friedland's testimony as given may have been false (92) surely an insufficient statement in view of the prosecutor's duty to correct false testimony once it is given. At the time the assistant made his affidavit he was evidently unaware that petitioner knew of the existence (but not the contents) of his memorandum to the Department of Justice concerning Friedland's proposed testimony. After petitioner served a subpoena for the memorandum and moved its production, the assistant made no further statements.

In the first opinion denying petitioner relief, the District Court held that the prosecutor had no advance knowledge of Friedland's testimony and that petitioner failed to show that the prosecutor knew that testimony was perjured (122-3). However, the prosecutor's own memorandum which the trial court refused to order produced for petitioner's use, plainly shows that the prosecutor knew what that testimony would be (contrary to his later affidavit) because he plotted it in just the manner it was given and plainly knew that it was false since he sought immunity because of Friedland's involvement in the change of the minutes:

> "3/11/69
>
> From Andy Maloney SDNY 212-264-6427
>
> 1. Jacob Friedland, Esq. (an attorney) in *U.S.* v. *Milton Silverman*
> 591 Summit Avenue
> Jersey City, New Jersey
>
> 2. unknown

3. none (FBI case no. 159-2561)

4. none known

5. no

6. Trial of *U.S.* v. *Milton Silverman,* President Local 810 Teamsters, business manager IBEW, administrator of relative union funds embezzlement 29 U.S.C. 501(c) converting union funds.

7. Document in posession of judge which is a document prepared by Friedland at or about time certain exhibits in evidence in trial were subpoenaed—Mr. Friedland could testify that the crucial pages of the union books are not now in same condition as they were before they were produced before the grand jury and therefore would be crucial to proving that the appearance in the union books as presently indicated is not in fact x exhibits. (converted funds of union to own use)

8. obstruction of justice on the part of Mr. Friedland in the tampering with books in question

9. Both the trial judge and myself believe that one of the crucial questions in the case is whether or not the minute books were tampered with. Mr. Friedland could testify that they are not now in the same condition as before the production to the Grand Jury. The judge is in possession of an attorney-client privilege document which should preclude Friedland from giving a false answer. Milton Silverman is a notorious union racketeer who the Department has been investigating for some 10 years without success . . . this is the closest we have ever come!

10. will testify

NEEDED BY THURSDAY MORNING . . . . March 13, 1969.

[Material excised by government]''

After the petition was denied, petitioner filed a motion under Rule 60(b) F.R.C.P., claiming surprise and unfairness because the subpoena for the memorandum and other evidentiary material was outstanding, as was the application under the Freedom of Information Act, and respondent had refused to honor its commitment to petitioner's counsel to allow inspection of such material in its files, (133-38A, 149-53, 181-2). While the Rule 60(b) motion was *sub-judice,* respondent submitted the above quoted memorandum to the District Judge, *in camera,* under a ''bond of confidentiality'' (176). Despite petitioner's vigorous protest to this procedure (173-5), the District Judge relied upon that memorandum, without disclosing it to petitioner, in reaffirming his denial of the petition, held that all the memorandum indicated was a mere surmise (the basis for which has not been disclosed) of the prosecutor that Friedland was involved in the alteration of the Union books (160-1).

The Court of Appeals held that the District Court's ruling on the Rule 60(b) motion was not appealable 556 F.2d at 656-7. Nonetheless, the Court of Appeals accepted the characterization of the memorandum in the District Court's opinion on that motion: ''No doubt, the prosecutor had his suspicions.'' 556 F.2d at 658. The Court of Appeals, however, did not have the memorandum before it because the District Judge had not forwarded it, under seal or otherwise as part of the record on appeal. (See Paragraph 5 of Motion for Reconsideration, *infra*).

No hearing was ever held.

Petitioner contended and vigorously contends that he was denied due process below as well as at his original trial and that the rulings below violate the standards for the conduct of proceedings under 28 U.S.C. Section 2255 and are contrary to the rulings of this Honorable Court and those of other Circuits.

Reasons for Granting the Writ

1. The decision below approves the denial of access to evidence of knowing prosecutorial use of perjured testimony contrary to the standards of due process, the decisions of this Court and followed by other Circuits.

The Second Circuit has here approved a denial to petitioner of a prosecutor's memorandum showing knowing prosecutorial intention to use perjured testimony, followed the District Court's erroneous characterization, on that court's *in camera* inspection, of the nature of the memorandum, did not itself inspect the memorandum before rendering its opinion and held the District Court's ruling unreviewable. That procedure and those rulings were a direct denial of due process and contrary to the decisions of this Court and the other Circuits.

This Court stated in *United States* v. *Reynolds*, 345 U.S. 1, 12 (1953), "since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privilege to deprive the accused of anything which might be material to his defense."

In *Giglio* v. *United States*, 405 U.S. 150, 153 (1972), this Court held, "As long ago as *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known

false evidence is incompatible with 'rudimentary demands of justice.' This was reaffirmed in *Pyle* v. *Kansas*, 317 U.S. 213 (1942). In *Napue* v. *Illinois*, 360 U.S. 264 (1959) we said, '[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.' Id. at 269. Thereafter *Brady* v. *Maryland*, 373 U.S. at 87, held that suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution." 405 U.S. at 153.

Again in *United States* v. *Agurs*, 427 U.S. 97, 104 (1976), this Court held that in cases involving a knowing prosecutorial use of perjury, a strict standard of materiality is required, "not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth seeking function of the trial process." 427 U.S. at 104. Where exculpatory evidence is discovered in the files of the prosecutor, even though, unlike here, the failure to disclose it at trial was merely negligent or an act of misjudgment, "the defendant should not have to satisfy the severe burden of demonstrating the newly discovered evidence probably would have resulted in an acquittal." 427 U.S. at 105.

Here the evidence not disclosed to petitioner showed not only that Friedland's testimony was perjurious, but that the prosecutor had planned it to be that and so deceptive (Friedland's denial of recollection of the state of the minutes) as to prevent effective cross examination. Possibly that was why the prosecutor failed at trial to disclose it or the facts on which the memorandum stated Friedland's involvement in the alternation of the minutes was based. That the prosecutor actually knew of the memorandum which he had prepared himself only a few days prior to Friedland's testimony cannot be doubted. When petitioner sought that memorandum under the Freedom of Informa-

tion Act, it was denied him on the basis that it was a privileged internal communication. In his affidavit in opposition to the petition below, the very same prosecutor denied that he knew what Friedland would say before he testified* (92). Yet the memorandum which that prosecutor had prepared prior to Friedland's testimony shows the prosecutor himself outlined the testimony which Friedland gave.**

Under "rudimentary standards of justice", petitioner was entitled to have the memorandum (and the underlying facts) for use at his trial. He was entitiled to them in support of his petition below. He did not get it. Reversal should follow, it is respectfully submitted. *Giglio, supra; Agurs, supra.*

In habeus corpus proceedings, the District Court has the obligation to fashion any necessary procedure to require the production of essential evidence. *Harris* v. *Nelson,* 394 U.S. 286, 299-300 (1969). The courts of other Circuits have followed this rule, e.g., *Shelton* v. *United States,* 497 F.2d 156, 159 (5th Cir. 1974); *Barry* v. *United States,* 528 F.2d 1094, 1101 (7th Cir. 1976); *Sullivan* v. *Dickson,* 283 F.2d 725, 727 (9th Cir. 1960); *Wagner* v. *United States,* 418 F.2d 618, 621 (9th Cir. 1969). See *Raines* v. *United States,* 423 F.2d 526, 529-30 (4th Cir. 1970). As this Court held in *Speiser* v. *Randall,* 357 U.S. 513, 520 (1958), "the procedures by which

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* This, of course, was no answer to the petition for under *Napue, supra,* the prosecutor is under a duty to correct false testimony once it is given. The prosecutor's duty to make exculpatory evidence available to the accused is well known. See ABA, Standards Relating to the Prosecution Function, Sec. 3.11(a).

** The memorandum also discloses that the prosecutor regarded Friedland's testimony as crucial to his case and reveals the animus against petitioner which motivated his urgent desire to provide that testimony. The prosecutor writes (inaccurately): "Milton Silverman is a notorious union racketeer who the Department has been investigating for some 10 years without success . . . this is the closest we have ever come!"

the facts of a case are developed assume an importance fully as great as the substantive rule of law to be applied." The decisions below were a clear departure from these rulings.

In *Alderman* v. *United States,* 394 U.S. 165, 182 (1969), this Court held that *in camera* examination of evidentiary material as was done below was insufficient, indeed would be a denial of due process if such examination alone were used by the District Court to rule on an application. As *Shelton* v. *United States, supra,* makes clear, in a Section 2255 proceeding even a confidential report must be made available for the use of the petitioner, not just the Court, where it is material to his application. In dealing with petitioner's protest against the *in camera* submission of the prosecutor's memorandum on the Friedland testimony and immunity, the District Court ruled, "Since the purpose in subpoenaing these memoranda was to have the Court consider them, petitioner has attained his goal." (160) Petitioner's goal was to have the memorandum disclosed so that the evidence therein and the natural further inquiry to which it would have led could be properly presented at the required hearing, not merely considered privately by the District Court without even being made a part of the record. Cf.: *Wingo* v. *Wedding,* 418 U.S. 461, 473-4 (1974). Certainly *Alderman* stands for the principle that whether *in camera* or open court examination is allowed, the material shall be available for review on appeal.

What happened at petitioner's trial was also a perversion of the immunity statute itself. Immunity when granted does not extend to perjury committed in the immunized testimony. 18 U.S.C. Sec. 6002. Here immunity was sought and granted for the purpose of procuring perjured testimony.

At a time when our government is pledged to clear its justice agencies of wrongdoing and concealment of such

wrongdoing, a decision such as the one below which completely frustrates a petitioner at trial, under Section 2255 or on appeal creates a morbid precedent.

2. The decision below failed to observe the due process standards requiring a grant of, or hearing on, a 28 U.S.C. Section 2255 application established by the decisions of this Court and those of other Circuits.

It was plainly improper for the decision below to affirm the District Judge's (who was also the trial judge) denial of the petition based on his interpretation of the trial evidence. The petition alleged facts *dehors* the record and in such instances at least a hearing is required. *Sanders* v. *United States,* 373 U.S. 1, 19-20 (1963); *Harris* v. *Nelson, loc. cit. supra.*

The petition and supporting affidavits and documents set forth detailed facts and allegations of knowing use of perjured testimony and other factors rendering petitioner's conviction constitutionally infirm which also required a hearing. *Sanders, loc. cit., supra.*

Rule 5(a) of the Rules Governing Section 2255 Proceedings requires that respondent's "answer shall respond to the allegations of the motion." See *Raines* v. *United States,* 423 F.2d 526, 529 (4th Cir. 1970). As has been seen, respondent's answer below woefully failed in this, the only affidavit in opposition, that of the prosecutor, did not deny perjury had been committed, did not deny that he knew of it, did not deny that he had suppressed evidence and witnesses and did not deny that he had willfuly failed to make investigation which would have revealed charges were baseless.* Under such circumstances, the petition might well

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* In connection with the alleged Chlystun payment of $1,000 to petitioner (15-21, 115, 150). See ABA Standards Relating to the Prosecution Function, Section 3.11(c).

have been granted for although given ample opportunity to do so, respondent made no further factual showing. See *Otero* v. *Rivera,* 494 F.2d 900, 902 (1st Cir. 1974); *United States* v. *Kessler,* 364 F.Supp. 66, 70-71 (S.D.O. 1973); *United States* v. *Johnson,* 288 F.2d 40, 45 (5th Cir. 1961). Cf. *Giglio* v. *United States,* 405 U.S. at 154.

At the very latest a hearing should have been ordered when respondent submitted *in camera* the prosecutor's memorandum which showed (as we have subsequently learned) that it contradicted the statement in his own affidavit that he had not known what Friedland's testimony would be.

The very wording of the statute required a hearing in this case. 28 U.S.C. Sec. 2255, Paragraph 3. *Machibroda* v. *United States,* 368 U.S. 487, 493-6 (1962).

The decisions of this Court, *Machibroda* v. *United States, supra; Fontaine* v. *United States,* 411 U.S. 213, 214-15 (1973); *Smith* v. *Yeager,* 393 U.S. 122, 125 (1968); *Townsend* v. *Sain,* 372 U.S. 293, 310, 312 (1963); and those of other circuits, *United States* v. *Haywood,* 464 F.2d 756, 762-3 (D.C. Cir. 1972); *Halliday* v. *United States,* 380 F.2d 270, 272 (1st Cir. 1967); *Moorhead* v. *United States,* 456 F.2d 992, 995-6 (3rd Cir. 1972); *Brown* v. *United States,* 462 F.2d 681, 684 (5th Cir. 1972); *Green* v. *United States,* 446 F.2d 650, 651 (6th Cir. 1971); *Crispo* v. *United States,* 443 F.2d 13, 14 (9th Cir. 1971); *Anderson* v. *United States,* 443 F.2d 1226, 1227-8 (10th Cir. 1971), are all contrary to the rulings below.

The constitutional and statutory necessity of a hearing in cases such as this one (unless the petition is granted on respondent's failure to make a sufficient response) is graphically illustrated by key rulings made against petitioner without any basis in the trial record: that petitioner

knew at the trial of the facts concerning Friedland's causing the alteration of the Executive Board minutes (124, 556 F.2d at 658) although Oschak, Sanchez and Brickman deny that (27-29), 46-7, 49-50), that all that the prosecutor knew of Friedland's role was a surmise or a suspicion (161; 556 F.2d at 658), although the prosecutor's memorandum itself contradicts this and was certainly sufficient to require further inquiry at a hearing.

The Court below emphasized the length of time between petitioner's original conviction and the appearance of the case below. 556 F.2d at 657. No recognition was given to an important causitive factor—respondent's failure to disclose to petitioner its memorandum on the Friedland testimony, at trial, under the Freedom of Information Act, on the filing of the petition, on appeal—not until after the petition for rehearing below had been denied.

Petitioner requested that the case be transferred and remanded for a hearing before a different judge (137-8; Appellee's main brief below, Point III), in view of the procedure followed below. In the light of this case it is respectfully suggested that this Court consider adopting the rule of *Halliday* v. *United States, supra,* that a Section 2255 hearing be held before a judge other than the trial judge. See Advisory Committee Note to Rule 4 of the Rules Governing Section 2255 Proceedings.

To allow the decision below to stand is to allow a nullification of the statutory and constitutional right of petitioner and the many others similarly situated to vindicate their well-founded and well-detailed allegations of denial of due process by the failure to hold a hearing in the District Court and the treatment of such failure in the Circuit Court as a mere exercise of discretion.

CONCLUSION

For these various reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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October 11, 1977